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BEFORE THE
SURFACE TRANSPORTATION BOARD

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In the Matter of:

INTERPRETATION OF THE TERM
"CONTRACT" IN 49 U.S.C. 10709

STB Ex Parte No. 669

REPLY COMMENTS OF THE WESTERN COAL TRAFFIC LEAGUE

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Its Attorneys

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The Western Coal Traffic League ("WCTL" or "League") hereby submits the following reply comments in response to the comments submitted by various parties on or about June 4, 2007, in response to the Notice of Proposed Rulemaking ("NOPR" or "Notice") that the Surface Transportation Board ("STB" or "Board") served in the above-captioned proceeding on March 29, 2007.

While many parties, including WCTL, shared and/or joined in the concerns that appeared to have motivated the Board to issue its Notice, the most striking thing about the various comments submitted is that only a single party, the U.S. Clay Producers Traffic Association ("Clay Association"), expressed unqualified support for the Board's proposal. Otherwise, all other parties, including WCTL, opposed the Board's proposal advanced in the Notice, expressed major misgivings, and/or saw the need for substantial modification or qualification.

Except for the Clay Association, all commenting parties appeared to prefer some continuation of the status quo, *i.e.*, individual, fact-specific determinations,

consistent with established precedent (which generally requires either essentially unambiguous evidence of a contract or pending litigation asserting the existence of a contract) to adoption of the Board's proposed rule. If nothing else, the Board's Notice seems to have nearly accomplished the rare feat of obtaining stakeholder consensus, especially regarding the potential for the proposed rule to result in counterproductive "unintended" consequences.

Given the near universal reservation and/or opposition concerning the Board's Notice, the proposal should not be adopted, at least not in the present form. Should the Board decide to proceed with a variant of its proposal, the Board should issue an additional notice that specifies the modifications to the proposal in order to provide parties with a meaningful opportunity to comment.

Various (albeit not necessarily all) shippers and railroads also found some common ground on specific criticisms of the proposed rule such as limitations on the Board's jurisdiction to declare contracts, the need for fact-specific determinations as to intent, the fact that contracts are governed by state law that varies from state to state, the resulting potential for specific arrangements to fall into a regulatory gap (or chasm, in Norfolk Southern's words) between STB and court jurisdiction, and the fact that a number of established common carrier arrangements include significant elements of bilateralism. Some shippers (including WCTL) and railroads noted that the Board's efforts would be better directed to the scope of the common carrier obligation, although

there was not a consensus on what the scope or substance of any clarification or revision of the common carrier obligation should be. Shippers were especially concerned that the Board's proposed approach would expand the railroads' leverage by allowing them to evade STB jurisdiction by including some modest element of bilateralism, *e.g.*, offering a lower rate or some volume assurance or commitment in order to extinguish any potential exposure to STB regulatory jurisdiction. Shippers also expressed concern that railroads are now effectively dictating the terms of even ostensibly "bilateral" agreements that would be considered contracts not subject to regulatory review. Alternatively, the railroads could exploit their market power by opting for common carriage status, especially where shippers face barriers to bringing rate cases, by offering a slightly lower rate and/or omitting "bilateral" terms desired by the shipper. These are all matters that would need to be addressed in any specific proposal.

Otherwise, the aspect of the opening comments that is of the most concern to WCTL are the efforts by the Association of American Railroads ("AAR"), BNSF Railway Company ("BNSF"), and especially Union Pacific Railroad Company ("UP" or "Union Pacific") to depict public pricing, especially that adopted in UP Circular 111 and BNSF 90068 for western coal transportation, as constituting valid common carrier activity, being pro-competitive, and/or not raising serious anticompetitive issues.¹ *See,*

¹WCTL notes that Norfolk Southern appears to have presented a very different view, explaining that the "Board correctly questions whether the hybrid pricing document" is an appropriate common carrier response, and noting that "NS has rate

e.g., AAR Comments at 4 (“legal precedent for the principle that public pricing is not anticompetitive”), BNSF Comments at 2 (claiming benefits of “public common carrier pricing” that is “subject to regulatory oversight”), and UP Comments at 9-11 and Attachment A (addressed *infra*).

As WCTL explained in its opening comments, whether public pricing legitimately advances competition or instead serves to restrain competition and facilitate the exercise of market power depends on the circumstances. *See, e.g.,* Maurice E. Stucke, *Evaluating the Risks of Increased Price Transparency*, 19 ABA Antitrust Magazine 81 (Spring 2005), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=927417#PaperDownload (cited in WCTL’s Opening Comments). While there is thus no per se rule against public pricing, that is a far cry from declaring, as the railroads suggest, that public pricing is pro-competitive under any and all circumstances. In fact, coal transportation has the key characteristics (high concentration, impediments to entry, homogeneous products, and low elasticity of demand) that make public pricing highly suspect, at best, under current conditions.

UP’s comments are especially suspect in this regard. For example, UP cites a 1983 DOJ Business Review Letter, 1983 WL 45985, involving the Western Railroad

authorities similar to Circular 111 that it considers to be contracts.” NS Opening Comments at 1-2. NS later adds that “[t]he hallmark of all of NS’s tariffs is that they are publicly available upon request to any person in accordance with 49 U.S.C. 11101(b).” NS Comments at 4. As discussed *infra*, such public disclosure is not true of UP’s and BNSF’s so-called public pricing.

Traffic Association's arrangements for exempted traffic.² However, for traffic to be exempted under 49 U.S.C. § 10502(a) in the first place, there must be a finding that the traffic is not subject to the exercise of market power (or is limited in scope) and its regulation is not necessary to carry out the national transportation policy. That situation is very different from the current situation, especially for coal transportation, the subject of UP Circular 111 and BNSF 90068, as the STB and its predecessor have long recognized. In that regard, the railroad statements as to the supposed virtues of public pricing fly in the face of their past (and continuing) efforts to maintain the confidentiality of contract rates, as well as prior statements by the STB, its predecessor, and the courts. As the STB explained in its Notice at 5 n.12:

See, e.g., Canadian National, et al. – Control – Illinois Central, et al., 4 S.T.B. 122, 149 (1999) (“As we explained in the UP/SP decision affirmed by the court, there are three elements, all of which are present here, that each make tacit collusion unlikely for markets in which two railroads operate. First, tacit collusion cannot flourish where, as in railroading, rate concessions can and are made secretly through confidential contracts.”); *see also Water Transport Ass’n v. ICC*, 722 F.2d 1025 (2d Cir. 1983) (“[I]t has long been recognized under the antitrust laws that public disclosure of contract terms can undermine competition by stabilizing

²Of course, UP does not appear to have sought a business review letter for UP Circular 111, nor does BNSF appear to have done so for BNSF 90068. There is also no public record that either carrier sought a declaratory order or other clearance from the STB as to their public pricing programs. The railroads are thus responsible for the creation of any ambiguity or uncertainty as to their pricing programs. As WCTL explained in its opening comments, their creation of the ambiguity is an additional reason to construe the ambiguities against the carriers in any individual dispute.

prices at an artificially high level.”); *see generally* *Petition To Disclose Long-Term Rail Coal Contracts*, ICC Ex Parte No. 387 (Sub-No. 961) (ICC served July 29, 1988) (lengthy discussion of the confidentiality of rail transportation contracts).

The UP Comments (as well as those of the AAR and BNSF) ignore this portion of the Board’s Notice altogether.

UP goes on to state that its “Circular 111 is a valid common carrier price document that does not reveal prices publicly.” UP Comments at 11 (capitalization deleted). But as noted in the NS Comments at 10, “the railroad must make the pricing document available to ‘any person on request’” (quoting 49 U.S.C. § 11101(b)). UP’s determination to disclose the rates “only to those who are covered by the rate document,” UP Comments at 11, simply cannot be reconciled with the statutory requirements for publication of common carrier rates.

UP’s Attachment A, ostensibly included to provide “more detail about the commercial reasoning behind and the elements of Circular 111,” *id.*, only adds to the confusion and suspicion. UP claims that its objectives were “simplification and customer-communication,” *id.* at 17, but its real aim appears to be diminished competition and higher rates. Even assuming *arguendo* that UP sought to bring uniformity to its arrangements, UP had no necessity to reveal the non-rate terms publicly to its competitors, while to some uncertain extent claiming to keep the rates themselves confidential.

UP's additional statements that it wanted "to communicate in an efficient manner the services it was willing to provide and the costs of those services," "credibly demonstrat[e] that none of its customers" would "forgo a 'better deal' made available to other UP customers," and "avoid" having "prospective customers . . . receive a wide array of misinformation from third parties (e.g., economic consultants and shipper trade groups) about the level of rates that UP was offering" are simply admissions that UP wanted to reduce the level of competition that it faces for its services. UP's actions, and BNSF's equivalent actions under BNSF 90068, fly in the face of the national rail transportation policy "to allow, to the maximum extent possible, competition and the demand for services to establish reasonable rates for transportation by rail." 49 U.S.C. § 10101(1). As the STB stated in its Notice at 5, "[a]n important competitive benefit of contracts is that they often enable shippers to obtain service commitments and lower rates that carriers might not otherwise offer through the public tariff process."

UP's statements indicate that its hybrid pricing is intended to eliminate those competitive benefits. The STB is rightly concerned about allowing common carrier authority to be used for such purposes, especially when the carrier appears to be picking and choosing among the few fundamental elements of what constitutes a common carrier rate. At the same time, the STB should be careful not to take any action that would confer any protections or immunity of such suspect activity from the application of other law, such as antitrust. The STB can achieve these objectives while continuing to proceed

on an informed case-by-case basis, consistent with established precedent, without adopting a general rule, especially that proposed in its Notice.

Respectfully submitted,

WESTERN COAL TRAFFIC LEAGUE

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